NEW ZEALAND’S PARLIAMENTARY PRIVILEGE BILL: THE EMPIRE FINALLY STRIKES BACK

The privileges of New Zealand’s Parliament – or, more accurately, those of its House of Representatives – primarily derive from two statutory sources. The first is the Bill of Rights 1688 (NZ), Art 9. The second is the Legislature Act 1908 (NZ), s 242. While giving parliamentary privilege its legal basis, neither legislative instrument defines exactly what it consists of, meaning that the existence (and ambit) of any particular privilege is a matter of legal interpretation. And as legal interpretation is the responsibility of the judicial branch of government, the courts have on a number of occasions been called upon to decide whether or not a given matter is covered by privilege.

While such judicial intervention is unavoidable, it does create the potential for inter-branch conflict. Simply put, the courts may be of the opinion that parliamentary privilege applies (or does not apply) in a particular way, while the members of Parliament disagree with that conclusion. This potential for disagreement then sets up a clash of authority. The courts’ role as interpreters and appliers of the law means that any judicial decision on whether and how parliamentary privilege applies in a given case effectively will define how it operates in future cases. However, because parliamentary privilege has its basis in statute, and because New Zealand’s Parliament is a sovereign lawmaker, it always is open to it to legislate to overturn the judiciary’s interpretation of the law and impose its own. What then makes this clash different to other areas where the judiciary and legislature disagree over the optimal form that law should take is the subject matter involved. In short, a court decision on parliamentary privilege involves the judicial branch deciding the extent of the legislature’s freedom from external interference; whilst a legislative decision to overturn such a decision inevitably involves an element of self-dealing, as the individuals who are deciding what parliamentary privilege ought to mean are the same people who gain the most from it.

These sorts of concerns have come to the fore in the form of the Parliamentary Privilege Bill 2013 (NZ), introduced into the House in December 2013. While the proposed legislation would accomplish a number of ends, the primary reason for its introduction is to give effect to a series of Privileges Committee reports that recommended overriding the effect of two particular decisions by the Privy Council and the New Zealand Supreme Court. As these bodies were and are the highest bodies in New Zealand’s curial hierarchy, the Bill represents a significant assertion of parliamentary authority over the views of the judiciary.

ENDING “EFFECTIVE REPETITION”

The first judicial decision in Parliament’s sights is the Privy Council’s decision in Jennings v Buchan. The case involved a defamation claim, brought after a member of Parliament in a parliamentary debate accused a named public official of misusing public money to pursue an affair. While this parliamentary statement could not itself found a cause of action, as it fell under the absolute protection afforded by Parliament’s “free speech” privilege, the Privy Council accepted that a later “effective repetition” of the statement outside of the House could be relied on in court. This approach was not thought to improperly intrude into the internal affairs of the House, or to interfere with Parliament’s free speech privilege, as:

2 The provision reads: “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.” This enactment remains a part of the law of New Zealand by virtue of the Imperial Laws Application Act 1988(NZ), s 3.
3 The provision reads: “The House of Representatives and the Committees and members thereof shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as on 1 January 1865 were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof.”
4 Jennings v Buchan [2005] 2 NZLR 577 (PC).
5 The exact words, used in an interview with a newspaper, were that the member of Parliament in question “did not resile from his claim about the official’s relationship”: Jennings v Buchan [2005] 2 NZLR 577 at [2].
Comments

reference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement. The propriety of the member’s behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament.6

The response of members of Parliament to this decision was less sanguine.7 A report from the Privilege’s Committee,8 later unanimously accepted by the House of Representatives, concluded that: "taking no action at all in response to the [Privy Council’s] decision is [not] practicable. Members are being challenged in media interviews in terms directly derived from the ‘effective repetition’ principle. Unless public debate is to be stymied, this must be addressed."9 It went on to recommend that “the Legislature Act be amended to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.”10 This recommendation was repeated in two later Privileges Committee reports.11

The government has now taken it up by including in the Parliamentary Privilege Bill a provision that states:

it is not lawful for evidence (including, without limitation, Hansard) to be offered or received, questions asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, ascertaining any content, effect, or meaning of a statement …

(a) made outside proceedings in Parliament by any person; and

(b) to the effect (regardless of its form or terms) that the person affirms, adopts, endorses, or refers to the content, effect, or meaning of a statement or an action that a participant in proceedings in Parliament (who may, but need not, be the person) made or took in those proceedings; but

(c) that, if considered alone, does not in and of itself repeat that content, effect, or meaning.12

Furthermore, for the avoidance of any doubt, the Bill also states that any such statements “are protected by absolute privilege”.13 The net effect is thus to undo the Privy Council’s ruling, meaning that legal liability will only attach to extra-parliamentary statements that when considered by themselves contain some defamatory meaning (or, indeed, attract any other legal consequences).

BROADENING “PROCEEDINGS IN PARLIAMENT”

The second judicial ruling threatened with a parliamentary override is the Supreme Court’s decision in Attorney-General and Gow v Leigh.14 The case involved a defamation claim brought by a communication’s advisor, Ms Leigh, after a Minister questioned her professional competence during his answer to a parliamentary question. Once again, this ministerial answer could not directly found a

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6 Jennings v Buchanan [2005] 2 NZLR 577 at [18].
8 Privileges Committee, Question of Privilege Referred 21 July 1998 Concerning Buchanan v Jennings [2005] AJHR I17G.
9 Privileges Committee, n 8, p 9.
10 Privileges Committee, n 8, p 9.
12 Parliamentary Privilege Bill 2013 (NZ) (179-1), cl 8(4).
legal claim, due to the free speech privilege. However, Ms Leigh instead sought to sue the departmental advisor, Mr Gow, who provided the Minister with the information on which his answer was based. In turn, Mr Gow (joined by the Attorney-General, representing the Speaker of the House) sought to have the action thrown out, on the basis that his advising the Minister was a “proceeding in Parliament” to which absolute privilege attaches.

The Supreme Court ruled in Ms Leigh’s favour, for two reasons. First, it found that the correct test for whether privilege applied was whether it was “necessary” for the proper and efficient functioning of the House of Representatives that the occasion on which Mr Gow communicated with the Minister be regarded as an occasion of absolute privilege. In other words, had Mr Gow shown that without this kind of occasion being regarded as absolutely privileged, the House could not discharge its functions properly? And having isolated this question, the court then concluded that it was not necessary to give Mr Gow the protection of absolute privilege: “It cannot be conducive to the proper and efficient functioning of the House to give those communicating with a Minister in present circumstances a licence to speak with impunity when predominantly motivated by ill will, nor a licence to take improper advantage of the occasion by using it for an improper purpose.”

Once again, the members of Parliament disagreed with the court. In a Privileges Committee report, they rejected the court’s approach to whether privilege applies (the “necessity” test) and also concluded that without the clear guarantee of absolute privilege, not only public servants but also other participants in the business of Parliament faced the risk of subsequent legal action. Quoting the Chair of the New Zealand Law Commission, Sir Grant Hammond, the Committee concluded that: “The Leigh decision does not appear to be grounded in the facts of parliamentary life, but rather it attempts to apply the law in the abstract. The reality of parliamentary life is that it is a set of complex interactions leading to expression in debates and select committees and it is not necessarily easy to draw sharp lines between these interactions and expressions.” Consequently, the Committee recommended legislating to overturn the court’s “necessity” test for “proceedings in Parliament”; a step the Parliamentary Privilege Bill takes as follows:

For the purposes of Article 9 of the Bill of Rights 1688, and for the purposes of this Act, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee, and therefore includes (without limiting that general definition) the following:

(a) the giving of evidence (and the evidence so given) before the House or a committee;
(b) the presentation or submission of a document to the House or a committee;
(c) the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee;
(d) the formulation, making, or publication of a document, including a report, by or pursuant to an order of the House or a committee (and the document so formulated, made, or published).

**ADDITIONAL MATTERS**

While the primary purpose of the Bill is to fix the problems that Parliament believes the courts have created, it does also accomplish a couple of other interesting matters of note. It specifically provides legal authority for the House of Representatives to levy a fine of up to $1000 on persons it finds to be

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16 Attorney-General and Gow v Leigh [2012] 2 NZLR 713 at [19].
20 Parliamentary Privileges Bill 2013 (NZ) (179-1), cl 8(2).
21 The Bill itself purports to “declare and enact, for the avoidance of doubt, the effect that Article 9 of the Bill of Rights 1688 had, on its true construction, before this Act’s commencement”; see Parliamentary Privileges Bill (NZ), No 179-1, cl 8(7), 21(4).
in contempt.\footnote{Parliamentary Privileges Bill 2013 (NZ) (179-1), cl 21.} Although the House has made use of this purported power in the recent past,\footnote{Privileges Committee, Question of Privilege on the Action Taken by TVNZ in relation to its Chief Executive, Following Evidence he Gave to the Finance and Expenditure Committee (2006) AHKR 117A, p 9.} the legal basis for it doing so was a matter of some doubt.\footnote{Geddis A, “Fines for Contempt in New Zealand’s House of Representatives” [2007] Public Law 425.} By explicitly authorising such punishments through legislation, Parliament removes any questions as to the enforceability of such an order. In addition, the Bill clarifies that the New Zealand House of Representatives does not possess the power to expel from membership of the House, and that members’ seats become vacant only in the specific circumstances provided in the \textit{Electoral Act 1993} (NZ), s 55.\footnote{Parliamentary Privileges Bill 2013 (NZ) (179-1), cl 22.} There again had been some doubt about this issue, with disagreement amongst academic commentators as to whether the House’s “composition privilege” still permitted it to take such a step against one of its members.\footnote{Compare Geddis A, “Gang aст-a-gley: New Zealand’s Attempt to Combat ‘Party Hopping’ by Elected Representatives” (2002) 1 Election Law Journal 557 and Joseph P, \textit{Constitutional and Administrative Law in New Zealand} (2nd ed, Brokers, Wellington, 2001) p 422 with Morris C, “Misbehaving Members of Parliament and How to Deal with Them” in Morris C, Boston J and Butler P (eds), \textit{Reconstituting the Constitution} (Springer, Heidelberg, 2011) pp 250-251.} Parliament is now moving to clarify the matter by disavowing any such legal power.

\section*{CONCLUSION}

The \textit{Parliamentary Privilege Bill} looks almost certain to pass into law, given its genesis in a cross-party committee report that was unanimously endorsed by the House. The impact of it doing so likely will not be that great; there are (at most) only a handful of situations in any given year where potential issues of \textit{parliamentary privilege} arise. Furthermore, many of those issues presently fall within the statutory \textit{qualified privilege} defence,\footnote{Defamation Act 1992 (NZ), s 16.} meaning that the absolute privilege afforded by the new law will not significantly increase the protection afforded to them. The main effect of the new law instead will be to tidy up the area of parliamentary privilege by clarifying the legal basis for some of the House’s powers, as well as draw a brighter line around those issues that are and are not within its ambit.

What is of interest beyond the actual effect of the new law, however, is the clash in perspectives that this legislation represents. In both \textit{Jennings v Buchanan} and \textit{Attorney-General and Gow v Leigh}, the courts focused on the individual claims before them and held that where the plaintiff has suffered a harm, then the law ought to provide a remedy unless there is a \textit{really, really} good reason for it not to. This concern with ensuring that the courts remain able to provide justice to a wronged individual caused them to pare back the reach of privilege. In response, members of Parliament have focused on the institutional workings of the House, concluding that if there is \textit{any} danger that allowing a person a legal remedy may inhibit how it conducts its business, then they ought not to be able to get one. Both perspectives then have their inbuilt biases and the potential to undervalue some matters and overestimate others. So what really then matters is, whose perspective finally triumphs? And Parliament has now given its answer to that question.

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\textit{Due recognition for the title of this comment is given to Allan J, “Parliamentary Privilege: Will the Empire Strike Back?” (2002) 20 New Zealand Universities Law Review 205.}